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No. 77-1092

In the Supreme Court of the United States

OCTOBER TERM, 1977

WINTHROP DRAKE THIES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

JEROME M. FEIT,
ANDREW S. GORDON,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. A) is reported at 566 F. 2d 1171 (table).

JURISDICTION

The judgment of the court of appeals was entered on December 5, 1977. Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including February 3, 1978, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a defendant accused of forcibly assaulting a federal agent while resisting arrest, in violation of 18 U.S.C. 111, is entitled to a jury instruction that he may

not be found guilty (a) if the agent "knew or should have known" that the arrest was invalid or (b) if the arrest was invalid and only "reasonable" force was used in resisting.

STATUTE INVOLVED

18 U.S.C. 111 provides in relevant part:

> Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of assaulting and resisting FBI agent A. Cameron Boyd, while the agent was engaged in the performance of his duties, in violation of 18 U.S.C. 111.[1] Petitioner was fined $500 (Pet. 3). The court of appeals affirmed (Pet. App. A).

In May, 1976, federal agents suspected that petitioner, an attorney, was dealing in stolen securities in violation of 18 U.S.C. 2315.[2] An investigation of petitioner was conducted, which culminated when petitioner sold allegedly stolen municipal bonds to an undercover federal agent. The bonds, with a face value of $1,000,000, were sold to the agent for $50,000 (Tr. 246, 248).

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[1]Petitioner was acquitted on three other counts charging forcible interference with federal officers under 18 U.S.C. 111.

[2]18 U.S.C. 2315 prohibits the sale of stolen securities moving in interstate commerce by any person knowing the securities to have been stolen.

Immediately after the sale, petitioner was arrested by FBI agents, without a warrant, and transported to the federal courthouse for processing (Tr. 263, 272). Petitioner was taken before United States Magistrate William Hunt, who concluded that the government's complaint, as it was then drafted, was "insufficient to state probable cause" (Tr. 76, 117). Following the court's finding, petitioner stated that he assumed he was discharged from custody and was free to leave (Tr. 76-77). The court replied that it did not know the circumstances of petitioner's appearance, but that the government was free to file an amended complaint at any time (Tr. 77).

Petitioner then stated that he was leaving and walked briskly from the courtroom (Tr. 78, 336). As petitioner was leaving the room, the Assistant United States Attorney representing the government at the arraignment called to the FBI agents that petitioner was still under arrest and was not free to leave. Agent Boyd then ran after petitioner, who by this time was in the hallway outside the courtoom. When he caught up with petitioner, the agent placed his hands on petitioner's shoulders and told him that he was still under arrest (Tr. 78-80, 336-338). Agent Boyd was then joined by Agents Scheiner and Wilson and Deputy Marshal Harris. The four officers succeeded in persuading petitioner to have a seat on a bench outside the courtroom (Tr. 339). Petitioner, however, while making loud and vehement protests against the officers' actions, unexpectedly jumped up and began pushing and punching Agent Boyd in an effort to free himself (Tr. 341). After a short struggle, the officers eventually succeeded in handcuffing petitioner (Tr. 342). While being escorted down the hall, petitioner managed to trip Agent Boyd, fell on top of him and grabbed the agent around the neck (Tr. 345-347). Petitioner was eventually subdued and charged with assaulting and resisting the four officers.

The district court instructed the jury that even if the arrest was found to be illegal,[3] petitioner had no right to resist if the officers were acting in good faith in the performance of their official duties at the time of the assault and were not acting "on a personal frolic of their own" (Tr. 652).

ARGUMENT

Petitioner contends that the district court erred in its instruction to the jury. Petitioner claims that the jury should have been instructed to find petitioner innocent (a) if, at the time of the arrest, the agents "should have known that the arrest was illegal," or (b) if the jury found that petitioner was "being illegally impeded" and used only "reasonable force" to resist the invalid arrest (Pet. 9, n. 7).

Petitioner's contention is without merit. The courts of appeals have consistently held that, absent a mistake regarding the official status of the officer making the arrest, it is unlawful to resist the actions of a federal officer engaged in the good faith performance of his duties. *United States* v. *Cunningham*, 509 F. 2d 961 (C.A.D.C.); *United States* v. *Martinez*, 465 F. 2d 79 (C.A. 2); *United States* v. *Beyer*, 426 F. 2d 773 (C.A. 2); *United States* v. *Simon*, 409 F. 2d 474 (C.A. 7), certiorari denied, 396 U.S. 829. See also, *Wright* v. *Bailey*, 544 F. 2d 737 (C.A. 4); *United States* v. *Velarde*, 528 F. 2d 387 (C.A. 9); *United States* v. *Ferrone*, 438 F. 2d 381 (C.A. 3), certiorari denied, 402 U.S. 1008. The determination under

[3]The trial court had earlier ruled that petitioner was not subject to continuing custody once the magistrate had dismissed the complaint (Tr. 502). The court also concluded that the agents did not "rearrest" petitioner in the hallway and, hence, the assertion of custody was illegal (Tr. 523).

18 U.S.C. 111 whether a federal officer was acting in "the performance of his official duties" at the time of an arrest is not dependent on what the officer knew or "should have known" regarding the legality of the arrest, but turns solely on whether the officer was acting in good faith in making the arrest and was not engaged in a frolic of his own. *United States* v. *Cunningham, supra*, 509 F. 2d at 963; *United States* v. *Martinez, supra*, 465 F. 2d at 82; *United States* v. *Heliczer*, 373 F. 2d 241, 245 (C.A. 2), certiorari denied, 388 U.S. 917.[4]

Although petitioner places primary reliance (Pet. 10, 13-14) on *John Bad Elk* v. *United States*, 177 U.S. 529, that decision is distinguishable. *John Bad Elk* involved a defendant who had resisted with deadly force an unlawful warrantless arrest by officers having no legal authority to make such arrests. *Id.* at 535-537. In reversing the conviction, the Court held that the trial judge had incorrectly charged that the arresting officers had the authority to arrest the defendant and that defendant had no right to resist. *Id.* at 534.

The Court concluded in *John Bad Elk* that the policemen there lacked even colorable authority to carry out the warrantless arrest. The FBI agents involved here, by contrast, were expressly authorized by statute to make arrests without warrants. See 18 U.S.C. 3052; *United States* v. *Watson*, 423 U.S. 411, 415-416. Whereas the policemen in *John Bad Elk* could not have been acting

[4]These cases are consistent with this Court's decision in *United States* v. *Feola*, 420 U.S. 671. In that case, the Court held that, in enacting Section 111, "Congress intended to protect *both* federal officers and federal functions * * *." *Id.* at 679. Assuming, as we must on the findings of the jury in this case, that the agent was acting in good faith in performing his duties, *Feola* indicates that both the agent and the federal function should be protected from *forcible* resistance.

in "the performance of [their] duties" because their duties did not include action of the type they had taken, the agents in this case were quite clearly acting in the good faith "performance of their duties," and the jury so found.

The other cases on which petitioner relies (Pet. 12) also do not support his position, since each involved the issue whether the federal officer assaulted had been acting in the performance of his official duties. In *Whipp* v. *United States*, 47 F. 2d 496 (C.A. 6), the court found that a federal agricultural inspector had no authority to assist state inspectors in the performance of their duties under state law and that he therefore was not protected against forcible resistance by 18 U.S.C. 111. *Id.* at 498. In *United States* v. *Kartman*, 417 F. 2d 893 (C.A. 9), the court held that an internal policy restricting the right of a federal marshal to make arrests for the charged offense might preclude the government's assertion that the marshal was acting in the performance of his official duties. *Id.* at 896. In *United States* v. *Reid*, 517 F. 2d 953 (C.A. 2), the court concluded that intervention by a DEA agent to prevent a robbery was sufficiently within the agent's duties to entitle him to protection under Section 111. *Id* at 960. Hence, rather than establishing a right to resist an unlawful arrest, these decisions merely apply the accepted principle that federal officers may not be forcibly resisted if they are acting within the scope of their official duties, and they therefore support the jury instruction given in this case.[5]

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[5]Petitioner also cites *United States* v. *Grimes*, 413 F. 2d 1376 (C.A. 7), but *Grimes* was a case in which the defendant came to the assistance of a fellow prisoner who was allegedly being illegally beaten by a prison guard. The court was careful to note that it was not faced with the different policy considerations governing the right to resist arrest. *Id.* at 1378, n. 3.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

JEROME M. FEIT,
ANDREW S. GORDON,
Attorneys.

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